



Court File No. **VLC-S-S-146119**

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

OKANAGAN NATION ALLIANCE

PLAINTIFF

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA AS REPRESENTED BY THE MINISTER OF ABORIGINAL
RELATIONS AND RECONCILIATION**

DEFENDANT

NOTICE OF CIVIL CLAIM

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

Claim of the Plaintiff

Part 1: STATEMENT OF FACTS

The Parties

1. The Plaintiff, the Okanagan Nation Alliance ("ONA"), is comprised of the Okanagan Indian Band, the Upper Nicola Band, the Westbank First Nation, the Penticton Indian Band, the Osoyoos Indian Band, the Lower Similkameen Indian Band, the Upper Similkameen Indian Band and the Confederated Tribes of the Colville Reservation ("Colville").
2. The Defendant, Her Majesty the Queen in right of the Province of British Columbia as represented by the Minister of Aboriginal Relations and

Reconciliation (the "Province"), is a signatory to the Incremental Treaty Agreement ("ITA") described herein.

The Okanagan Nation Alliance

3. The ONA is an alliance of eight member communities whose lands include the Arrow Lakes region in the Province of British Columbia, including the lands in the area of Wensley Bench.
4. Seven ONA member communities, being the Okanagan Indian Band, the Upper Nicola Band, the Westbank First Nation, the Penticton Indian Band, the Osoyoos Indian Band, the Lower Similkameen Indian Band and the Upper Similkameen Indian Band (the "ONA member communities in Canada"), are bands within the meaning of the *Indian Act*, R.S.C., 1985. Colville is a confederation of 12 tribes, including the Lakes or Sinixt tribe, established pursuant to presidential executive order.
5. The ONA member communities in Canada and Colville have historically shared cultural, familial, linguistic, territorial, economic and political connections, and maintain these connections despite the establishment of the Canada-U.S. border.
6. The ONA member communities in Canada have for many years collaborated with Colville on matters of mutual interest in the Arrow Lakes region, including on issues involving Aboriginal title and rights.
7. Pursuant to these connections, in 2010 the ONA and Colville signed a Unity Declaration by which the ONA member communities in Canada and Colville committed to work together on matters of mutual interest, and through which Colville became a member of the ONA.
8. The ONA is governed by a Chiefs' Executive Council ("CEC") comprised of the Chiefs of the ONA member communities in Canada and the Colville Chair. The

CEC, on behalf of the ONA member communities, has authority to advance the Aboriginal title and rights of the ONA member communities, including the interests of the descendants of the Indigenous peoples of the Arrow Lakes region of British Columbia, commonly referred to as the Sinixt or the Lakes.

9. The Province and Canada have long been aware of the ONA member communities' Aboriginal title and rights in the Arrow Lakes region as advanced by the CEC, and have actively engaged with the CEC in respect of these claims, including at the time of the execution of the ITA.

The ONA and the BC Treaty Commission Process

10. The ONA member communities are not currently participating in negotiations through the BC Treaty Commission process and do not expect to resolve their claims to Aboriginal title and rights through the treaty negotiation process as currently mandated by the federal and provincial governments.
11. Westbank First Nation ("Westbank") participated in the BC treaty making process as overseen by the BC Treaty Commission between 1993 and 2009. Westbank suspended its participation in treaty negotiations indefinitely on November 25, 2009 on the basis that the Province's and Canada's unwillingness to alter their negotiation mandates had resulted in a negotiation process that was unworkable, inconsistent with the common law and Westbank's Self-Government Agreement, and which precluded a reasonable prospect of resolving the issues under negotiation.

The Memorandum of Understanding

12. The Arrow Lakes region is part of the Columbia River watershed. Since 2011, the Province and Canada have engaged with the CEC in a multi-year process

of consultation in respect of the Columbia River Treaty Review Process in relation to the renewal of the Columbia River Treaty.

13. In April 2013, as part of the Columbia River Treaty Review Process, the ONA and the Province executed a Memorandum of Understanding ("MOU") for the purpose of exploring collaborative pathways for reaching understandings and agreements on areas of mutual interest, including in respect of the Columbia River Treaty Review Process. The MOU includes a dispute resolution clause which set outs a process to guide the parties in resolving disputes which may arise in the course of negotiations in relation to the issues subject to the MOU.

The Ktunaxa Treaty Negotiations

14. In 1993, the Ktunaxa Kinbasket Treaty Council filed a Statement of Intent ("SOI") on behalf of the Ktunaxa Nation (the "Ktunaxa") to negotiate a comprehensive treaty with the Province and Canada. The BC Treaty Commission accepted the SOI for the purpose of commencing treaty negotiations in 1996.
15. The SOI is Stage One of six stages under the BC Treaty Commission process, followed by Stage Two (Readiness to Negotiate); Stage Three (Negotiation of a Framework Agreement); Stage Four (Negotiation of an Agreement in Principle); Stage Five (Negotiation to Finalize a Treaty) and Stage Six (Implementation of the Treaty).
16. The CEC advances Aboriginal title and rights on behalf of the ONA member communities in the Arrow Lakes region that are the subject of the treaty negotiations between the Province, Canada and the Ktunaxa.
17. At the conclusion of Stage Three of the treaty negotiations, the Province, Canada and the Ktunaxa initialed a Treaty Framework Agreement dated November 26, 1997. As part of the Framework Agreement, the Ktunaxa

committed to use best efforts to resolve any issues of overlapping claims with other First Nations during the Agreement in Principle ("AIP") stage of the treaty negotiations.

18. The Province, Canada and the Ktunaxa are currently negotiating an AIP.
19. The Province and Canada do not require the resolution of overlap issues between First Nations before executing an AIP in the treaty process.

Events prior to the Ktunaxa Incremental Treaty Agreement

20. By letters dated October 5, 2012, the Province and Canada notified some of the ONA member communities that the Province was in the process of negotiating an AIP and ITA with the Ktunaxa.
21. By letter dated November 19, 2012, the CEC advised the Province and Canada that the Crown had failed to consult in respect of the ITA, despite having long-standing notice of the ONA member communities' Aboriginal title and rights as advanced by the CEC in the area of the ITA.
22. By letter dated December 13, 2012, the Province and Canada responded by stating that the Province and Canada required all ONA member communities to confirm that consultation with respect to the ITA was to take place collectively through the ONA.
23. By letter dated January 18, 2013, the CEC advised the Province and Canada that consultation should begin immediately on a collective basis through the CEC. The Province and Canada did not respond to the January 18, 2013 letter prior the execution of the ITA.
24. On March 28, 2013, representatives of the CEC met with a representative of the Ktunaxa Nation Council ("KNC") to express concerns about the ITA and to

urge the KNC not to execute the ITA while the ONA's concerns remained unaddressed.

25. At the time of the meeting, the ONA was unaware, and the KNC did not disclose, that the ITA had already been executed by the Ktunaxa Nation Council Society on behalf of the Ktunaxa on March 27, 2013.
26. The ITA was executed by the Province on March 28, 2013.

The Ktunaxa Incremental Treaty Agreement

27. ITAs, including the ITA between the Province and the Ktunaxa, are legally-binding pre-treaty agreements negotiated under the BC Treaty Commission process which allow First Nations to access treaty-related benefits before the parties reach a Final Agreement at Stage Five of the treaty process.
28. ITAs are intended to create incentives for First Nations to achieve further milestones in the treaty process and to provide enhanced certainty over lands and resources that are the subject of treaty negotiations.
29. The ITA between the Province and Ktunaxa provides for the transfer of approximately 242 hectares of land in the area of Wensley Bench (the "Wensley Bench lands") in the Arrow Lakes region in fee simple to the Ktunaxa prior to the conclusion of a Final Agreement in the treaty process.
30. As part of negotiations in relation to the Final Agreement, the Province and the Ktunaxa will negotiate the status of the lands transferred under the ITA as "Ktunaxa Lands" within the meaning of the Final Agreement.
31. The ITA is expressly intended to serve as a contribution by the Province towards the reconciliation of the Province's and the Ktunaxa's interests and the settlement of the Ktunaxa's claims to Aboriginal title and rights.

Events subsequent to the Ktunaxa Incremental Treaty Agreement

32. On April 9, 2013, the ONA became aware of the executed ITA through the media.
33. By separate telephone calls on April 9, 2013, Jay Johnson, Senior Policy Advisor for the ONA, advised Steve Munro, Deputy Minister of Aboriginal Relations and Reconciliation and Mark Lofthouse, Chief Negotiator for the Ministry of Aboriginal Relations and Reconciliation, of the ONA's concerns about the Province's execution of the ITA.
34. By letters dated April 12 and April 19, 2013, the CEC wrote to the Province to emphasize the Province's failure to consult with the ONA in respect of the ITA, and to the Ktunaxa to express disappointment in the Ktunaxa's decision to sign the ITA.
35. By letters dated April 12, April 30 and May 24 2013, the Province and Canada reiterated the position that the Province and Canada would only consult through the CEC if the individual ONA member communities provided written confirmation of the CEC's authority to carry out consultation in respect of the ITA.
36. By letter dated April 30, 2013, the CEC requested copies of the Province's and Canada's impacts assessment and preliminary strength of claim assessment for the CEC's Aboriginal title and rights in respect of the ITA. To date, the requested assessments have not been provided.
37. On May 14, 2013, the Provincial election was held. The campaign period officially began on April 16, 2013.
38. On May 29, 2013, representatives from the CEC met with representatives from the Province, including Deputy Minister Munro and Lofthouse, in Nanaimo, B.C. At the meeting the Province agreed to take no steps to

implement the ITA and to enter into without prejudice, confidential discussions with the ONA pursuant to the MOU between the ONA and the Province to attempt to resolve the issues arising from the ITA.

39. Between June 2013 and March 2014, the ONA, including representatives of the CEC, engaged in a series of without prejudice, confidential meetings with the Province in an effort to resolve the issues arising from the ITA pursuant to the framework set out in the MOU.
40. By letter dated June 17, 2013, Deputy Minister Munro confirmed that a committee composed of ONA and provincial representatives would be created pursuant to the MOU to address issues related to the ITA.
41. By letters dated June 18 and August 15, 2013, the Province advised that it was prepared to put the process of transferring lands to the Ktunaxa pursuant to the ITA on hold until there was clarity on Aboriginal interests in the area.
42. By letter dated July 9, 2013, the CEC reiterated to the Ktunaxa that it was essential that no steps be taken to implement or advance agreements or potential agreements with respect to lands and resources in the Arrow Lakes region pending further efforts to resolve the issues related to the ITA.
43. By letters dated July 26 and October 23, 2013, the CEC advised the Province that it was engaging with the Crown and the Ktunaxa in an effort to resolve issues related to the ITA based on the Province's assurance that it would take no steps to implement or advance agreements with respect to land and resources in the Arrow Lakes region while such efforts were underway.
44. By its letter of October 23, 2013, the CEC further requested that the Province provide information as to the process, principles and standards it applied in conducting a strength of claim analysis for the purpose of negotiating with

the Ktunaxa about the Arrow Lakes region, and the Wensley Bench lands in particular. To date, the requested information has not been provided.

45. On October 31, 2013 and May 12, 2014, representatives of the CEC met with representatives of the Ktunaxa in an effort to resolve the issues arising from the ITA.
46. On January 24, 2014, the CEC provided the Province with a confidential and without prejudice "Wensley Bench Solutions Paper" which set out potential options for resolving the issues arising from the ITA.
47. By letter dated February 27, 2014, Canada advised that the BC Treaty Commission process does not require a First Nation seeking to negotiate a Final Agreement to provide evidence supporting their asserted rights in the area subject to the treaty negotiations.
48. On March 10, 2014, representatives of the CEC met with representatives of the Province, including John Rustad, Minister of Aboriginal Relations and Reconciliation, to discuss issues associated with the Province's decision to execute and move forward with the implementation of the ITA.
49. By letter dated March 13, 2014, the CEC wrote further to the March 10, 2014 meeting to advise Minister Rustad of the CEC's concerns that the ONA's efforts to resolve the issues resulting from the ITA were not being reciprocated, and in particular that the Province was not taking steps to collaboratively identify solutions under the MOU as it had promised.
50. By letters dated April 22 and May 29, 2014, Minister Rustad advised that the Province wished to re-engage the ONA in a formal consultation process outside of the MOU in respect of the ITA, which the CEC understood to mean that the Province now intended to move ahead with the implementation of the ITA.

51. By letters dated May 1 and June 10, 2014, the CEC advised Minister Rustad that the Province's decision to proceed with the implementation of the ITA was inconsistent with its constitutional duty to consult and the honour of the Crown, including with respect to commitments made by the Province after the execution of the ITA.

Part 2: RELIEF SOUGHT

The Plaintiff claims the following relief against the Defendant:

1. A declaration that the Province breached the honour of the Crown and the duty to consult by failing to consult with and accommodate the ONA prior to the Province's execution of the ITA;
2. A declaration that the Province breached the honour of the Crown by failing to fulfil the commitments it made to the ONA after the execution of the ITA;
3. An interlocutory and permanent injunction prohibiting the Province from taking any further steps to transfer the Wensley Bench lands to the Ktunaxa pursuant to the ITA;
4. In the alternative, an order quashing the Province's decision to execute the ITA;
5. Costs of this action, including special costs; and
6. Such further and other relief as this Honourable Court deems just.

Part 3: LEGAL BASIS


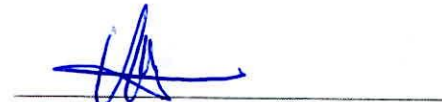
1. On behalf of the ONA member communities, the CEC advances Aboriginal title and rights in respect of the Wensley Bench lands which are to be transferred to the Ktunaxa pursuant to the ITA.
2. The Province was aware, and was provided with evidence in support of, the ONA member communities' Aboriginal title and rights as advanced by the CEC in respect of the Wensley Bench lands prior to the Province's execution of the ITA.
3. Subsequent to the execution of the ITA, the Province committed not to move forward with the implementation of the ITA until further clarity on Aboriginal interests in the Wensley Bench area was achieved, and to attempt to resolve the issues arising from the ITA pursuant to the MOU between the ONA and the Province.
4. The Province breached the honour of the Crown and the duty to consult by failing to consult with and accommodate the ONA prior to the Province's execution of the ITA.
5. The Province breached the honour of the Crown by failing to fulfil the commitments it made to the ONA after the execution of the ITA.

Plaintiffs' address for service:	FIRST PEOPLES LAW CORPORATION 300-111 Water Street Vancouver, BC V6B 1A7 Tel: 604.685.4240
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E-mail address for service:	bmcivor@firstpeopleslaw.com

Place of trial: Vancouver, BC

The address of the registry is: 800 Smithe Street
Vancouver, BC V6Z 2E1

Dated: August 8th 2014


Bruce McIvor
Mark Underhill

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

No. _____
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DEFENDANT

NOTICE OF CIVIL CLAIM

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